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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-473

DANIEL T. TAYLOR, III, - - - - - Petitioner

versus

JOHN P. HAYES, JUDGE, Jefferson Circuit Court, Criminal Branch, Second Division, - Respondent

On Petition for Writ of Certiorari to the Court of Appeals of Kentucky

BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

ARTHUR J. MANDELL
Chairman, Amicus Curiae Committee, Association of Trial Lawyers of America
First National Life Building
Houston, Texas 77002

Counsel for Amicus, Association of Trial Lawyers of America

Of Counsel:
JOHN A. BURGESS
Chairman, Criminal Law Section Association of Trial Lawyers of America
Box 766
Montpelier, Vermont 05602

WESTERFIELD-SONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

The Association of Trial Lawyers of America, as Amicus Curiae, respectfully submits this brief in support of the Petition for Writ of Certiorari, and urges the Court to grant the petition.

INTEREST OF THE AMICUS CURIAE

The Association of Trial Lawyers of America is a body of approximately 27,000 trial advocates, voluntarily associated, and practicing law in all parts of the territorial United States. Its membership is composed of attorneys actually involved in Court room advocacy.

The Association is loosely divided into eight separate areas of interest to its members and to the profession in general, covering the full spectrum of the law, to-wit: tort law, environmental litigation, commercial litigation, criminal defense, family law, Admiralty law, Workmens Compensation, and Appellate practice.

The Amicus Curiae Brief which is here respectfully presented to the Court in the case instant was originally recommended, as to preparation, by the Chairman of the Criminal Law Section of the Association, and then approved by the officers of the Association, following which it has been prepared by the Chairman of the Amicus Curiae Committee of the Association of Trial Lawyers of America, and thereafter endorsed by President of the Association as exemplifying the ideals of the Association, as to the particular issues herein to which it addresses itself.

Both the general membership, and the elected leadership, of the Association of Trial Lawyers of America, identifies with and feels an extremely keen interest in the case now urged to the Court for *Certiorari,* and in its eventual outcome. The particular individuals throughout the Nation—practicing attorneys, all—who comprise this membership are voluntarily associated under a set of principles, the extension of which imbues them with a vested interest in the outcome of this particular litigation.

The Petition for Certiorari hereinbefore filed with this Court raises issues of such significance as to affect every member of the Association, as well as every trial

lawyer across the country. The manner in which this Court deals with the issue of summary contempt, as involved in the original proceedings against the Attorney-Petitioner herein, will have long-range implications as to how every member of the Association thereafter practices his profession. In fine, the resolution of the question regarding the actual breadth of the Constitutional protections to be afforded Attorneys who are faced with such contempt procedures as are involved in the instant case will be of paramount importance to the members of the Association of Trial Lawyers of America, for which reason it here respectfully files this *amicus curiae* Brief.

REASONS FOR GRANTING THE WRIT

I

The Petition for Certiorari Should Be Granted Because Serious Constitutional Issues Are Presented by This Case That Are of Paramount Importance to Trial Attorneys, Who Also Need to Know, With Particularity, What Conduct Is "Contemptuous", At Law, and Punishable as Such.

The power of a Judge to hold an attorney in contempt, when abused and exercised in an arbitrary and intemperate manner, can destroy not only the Constitutionally-protected right of a Defendant to Counsel, but can fundementally impair the fair administration of criminal justice. When such abuses do occur, the finely-balanced "referee" role of the Trial Judge becomes totally compromised, and a fair trial for the Defendant in such circumstances is totally impossible.

The actions of Petitioner which were ruled by the Respondent-Judge to be "contemptuous", which ruling the Kentucky Court of Appeals affirmed, involved situations that Trial Attorneys find themselves faced with daily. For an example, many lawyers believe that the voir dire examination of the prospective jurors is a determinative factor as to the outcome of the trial. When a Judge imposes the stringent limitations on the voir dire examination as was done here, and then, without any basis in fact, cites an attorney for contempt of Court (alleging that Petitioner "showed disrespect" to the prospective jurors), such a Judge is not only hindering the selection of a proper and unbiased jury as guaranteed by the Sixth and Fourteenth Amendments, but is grievously punishing the attorney for attempting to perform his sworn professional duty. That waving of an advocate's arms at an adverse witness ("indicating disbelief", as the Respondent-Judge charged Attorney-Petitioner in the case at Bar) should constitute a basis for punishment for contempt is an untenable result. It is noted, to expand on this a bit, that in the herein case, the Petitioner received one of the multiple contempt citations from this Judge for "waving his arms at a witness in a derogatory manner, indicating that the witness was untruthful, and thereby showing utter contempt for a prior ruling of the Court." (App., p. 55 of Pet.).* One wonders since when it has become improper in any way whatsoever for a defense attorney, conducting his cross-examina-

*Implicit in this interesting proceeding by this Trial Judge is the proposition that the Court had, then, already ruled, as a matter of law, that this witness was to be believed.

tion of a prosecution witness, to attempt to indicate that the witness is untruthful. The advocacy role of impeaching is historic, and essential to the advocacy system.

It is noted that all of the contempt citations placed against Petitioner by Respondent occurred in a heated criminal trial, of great local noteriety, wherein two young Black men were on trial for their lives for the alleged murders of two white policemen. As has been observed many times other than here, the adversary role of trial lawyers does not allow the trial of criminal cases to be carried out as a contemplative exercise. Almost invariably, murder trials, like the one here under consideration, ellicit passionate, heated feelings on both sides.

We urge that the present case is a particularly appropriate one in which this Court should consider the issue of *what* conduct on the part of a defense attorney constitutes "contempt" in the legal sense. Most of the contempt charges here leveled against Petitioner arose from an alleged lack of "respect" shown to the Court. However, the legal test of contempt is not "respect". *In re Little,* 404 U. S. 553 (1972). Nothwithstanding, this does appear to be the test that was here employed by the Trial Judge and the Kentucky Court of Appeals. As this Court has previously held, for "disrespect" to constitute criminal contempt, the attorney must "in some way create(s) an obstruction which blocks the Trial Judge in the performance of his Judicial duty." *In re McConnell,* 370 U. S. 230, 236 (1962). The record of the case here under inquiry

does not demonstrate any "material obstruction to the administration of justice".

If the actions of the Petitioner herein, while engaged in the zealous and vigorous defense of his hard-pressed client, are to be punished in this summary manner, every member of the Association of Trial Lawyers of America now finds himself within the area of danger. Thus, a problem will now confront American trial lawyers which was eloquently drawn by Mr. Justice Black in his dissent in *Sacher* v. *United States*, 343 U. S. 1 (1952), wherein he wrote, at page 18:

> "I cannot reconcile ths summary blasting of legal careers with a fair system of justice. Such a procedure constitutes an overhanging menace to the security of every courtroom advocate in America. The menace is most ominous for lawyers who are obscure, unpopular, or defenders of unpopular or unorthodox causes."

II

The Petition for Certiorari Should Be Granted to Determine Whether Or Not the Petitioner Was Denied His Sixth Amendment Right to Trial By Jury.

The question of what constitutes a "serious" contempt, as opposed to a "petty" contempt, within the concept of the right to trial by jury, as guaranteed by the Sixth Amendment, is, of course, one of extreme importance to the American system of trial advocacy. In the case of this Petitioner, he initially faced a period of fifty-four months in jail, for his alleged "contempts" committed during this trial. We are unaware

of any longer sentence given to any attorney for criminal contempt in the history of American jurisprudence. Four months after this original sentencing, the Respondent herein was allowed to "correct" the sentence herein. Under that "correction", all of the specifications of contempt were brought just under six months. This then reduced the cumulative sentence against Petitioner to forty-one months. Respondent then adopted the position that, since no single sentence against Petitioner *exceeded* six months, Petitioner had absolutely no right to a jury trial. Thereafter, the Kentucky Court of Appeals ruled that the sentences against Petitioner were to be served concurrently. (It is noted that in his "corrected" Judgment, previously referred to, the Respondent was silent as to whether said sentences were to be served concurrently or consecutively.) This "tailoring", by the Kentucky Court of Appeals, of Petitioner's jail time from an attackable forty-one months, to six, might seem to render this whole episode *de minimus,* but, actually, to a trial attorney with an active law practice, such confinement would be tantamount to an occupational death sentence.

To further stress the point we are here making, by its action last-alluded to, the Kentucky Court of Appeals changed the characterization of the alleged offenses from "serious" to "petty". Therefore, we urge, it has become incumbent upon this Court to set forth guidelines in contempt proceedings as to what constitutes "petty" and "serious" contempts of Court, within the meaning of the Fifth and Fourteenth

Amendments to the United States Constitution. Also, we are hopeful that the Court will speak to the proposition as to whether the right to trial by jury can be defeated by the actions of a Trial Judge and an Appellate Court, as was done here.

Historically, the right to trial by jury is the foundation of our system of criminal justice. We earnestly submit that Judges within the system deal with this right at their peril, when they attempt its abridgement. Further, we urge that an attorney is as much entitled to the protections here involved as is any other personage, high or low, coming before an American Court. Under the implication of the Opinions of this Court in *Cheff* v. *Schackenberg,* 384 U. S. 373 (1966), *Bloom* v. *Illinois,* 391 U. S. 194 (1968), and *Baldwin* v. *New York,* 399 U. S. 66 (1970), as well as the decision of the United States Court of Appeals for the Seventh Circuit as enunciated in *United States* v. *Seale,* 461 F. 2d 345 (CA 7, 1972), the Petitioner clearly had a Constitutional right to trial by jury in the circumstances hereof, but, to date, he has not been afforded same by the Courts of the Commonwealth of Kentucky.

III

The Petition for Certiorari Should Be Granted to Determine Whether Petitioner Was Entitled, Under the Fifth, Sixth and Fourteenth Amendments, to the Assistance of Counsel, to Have Adequate Notice of the Charges, and to an Opportunity to Present a Defense or Matters in Mitigation, Prior to the Pronouncement of Sentence Against Him.

At the conclusion of this trial, Petitioner was summoned before Respondent (Tr. 2288), who then attacked the character and professional qualifications of Petitioner, without giving Petitioner any opportunity to respond thereto whatsoever (Tr. 2288-2290). Respondent then imposed nine counts of unspecified contempt against Petitioner, and summarily directed his bailiffs to remove Petitioner (Tr. 2290), to be confined in prison for fifty-four months (Tr. 2290). At no time was Petitioner permitted to speak (Tr. 2289-2290). When Petitioner *attempted* to speak against the situation of the moment, Respondent threatened to have gags stuffed in his mouth (Tr. 2290), and then ordered his Court policemen to "take him away" (Tr. 2290)! It was not until almost five months later that Petitioner was even advised by this Judge of the specific charges he had been cited for (App., p. 53 of Pet.).

We would urge this Court to decide the question of whether or not due process of law requires that a trial lawyer cited for contempt be given some opportunity to present a defense thereto, or matters in mitigation thereof, before judgment and sentence are

passed. The right to a hearing is a fundamental concept in American law, and included in this concept, necessarily, is the opportunity to speak in one's defense, or in mitigation. *Groppi* v. *Leslie,* 404 U. S. 496, 501 (1972); *In re Oliver,* 333 U. S. 257, 273 (1948); *In re Hammersmith,* 4 Ex. 87, 96, 154 Eng. Rep. 1136, 1140 (1849).

The fact that what is involved is a summary contempt proceeding does not alter the requirement of a hearing being held thereupon. As Mr. Justice Frankfurter said in his dissent in *Sacher* v. *United States,* 343 U. S. 1, at page 30 (1952), in recognizing the need to place the restriction of a hearing upon the summary contempt process:

> "Among the restrictions to be implied, as a matter of course, are two basic principles of our law—that no Judge should sit in a case in which he is personally involved, and that no criminal punishment should be meted out except upon notice and due hearing, unless overriding necessity precludes such indispensable safeguards for assuring fairness and affording the feeling that fairness has been done."

We submit that, in the present case, there did not exist any "overriding necessity" to dispense with notice and hearing. The case was over, and it was certainly a foregone conclusion that Petitioner, a middle-aged, life-long resident of the City of Louisville, with an active law practice, as well as all personal ties, binding him there, was not going to flee to parts unknown.

IV

The Petition for Certiorari Should Be Granted to Determine Whether Petitioner Was Denied His Constitutional Right to a Fair Trial Before an Impartial Judge On the Facts of the Instant Case.

The law is clear that, as an impartial magistrate is an absolute essential to a fair trial, when the Judge himself has been the victim of a personal attack, or even when he wrongly so perceives himself as having been, he should not sit in judgment on his attacker. Being human, he might not remain totally fair and dispassionate. *Mayberry* v. *Pennsylvania,* 400 U. S. 455 (1971). When the Trial Judge has become "personally embroiled" in controversy with the alleged contemptnor, he should disqualify himself. *Offutt* v. *United States,* 348 U. S. 11 (1954).

It could, perhaps, be well-argued that it is almost too much to ask of any Judge to remain truly fair and open-minded in sitting in judgment over someone who has allegedly committed contemptuous acts before him. *Sacher* v. *United States, supra.* The present case depicts this problem very clearly. The record shows that Respondent's personal feelings towards the Petitioner were intertwined with all of the contempt charges which he leveled against him, and that he genuinely felt that he was being attacked by the Petitioner, whether that was the actual case or not (Tr. 81, 342, 350, 785, 1364, 1507, 1804, 1851, 1992-93). The record further shows that Respondent adopted an adversary posture in regard to Petitioner from the very begin-

ning of the trial (Tr. 348, 546, 1909, 1957). In the records of the United States Supreme Court, for the year 1970, will be found a prior application for extraordinary relief, brought by this lawyer to seek protection from this Judge, that occasion having been grounded on a jail sentence (again for "contempt"), which Respondent imposed on Petitioner for attempting to remove a capital case from his Court to the United States District Court, under the Federal Removal Statute.

The Court is referred to the Petition for Certiorari hereinbefore filed, for the actual language of this Respondent in regard to Petitioner, and indicating this adversary posture which Respondent adopted towards this Petitioner from the beginning of this trial to its conclusion.

All of the foregoing being the case, certainly, under the law, this Respondent should have been disqualified from sitting in judgment over Petitioner as to any contempts purportedly committed by Petitioner against the Court.

CONCLUSION

We respectfully submit that the Petition for Certiorari should be granted because Daniel Taylor, the Petitioner herein, has been denied his basic Constitutional rights, both by the actions of the Respondent herein, and their affirmance by the Kentucky Court of Appeals. Further the impact and scope of this case, upon which review is here sought, is of such impor-

tance and magnitude as to make it a case of national significance, affecting every trial lawyer in the United States.

Wherefore, the Association of Trial Lawyers of America respectfully urges the Supreme Court of the United States to grant the Petition for Certiorari in this case.

Respectfully submitted,

ARTHUR MANDELL

Counsel for Amicus, Association of Trial Lawyers of America